No. 89-322

In The

Supreme Court of the United States

October Term, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNEICE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Idaho

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Under the principles applicable pursuant to § 301 of the Labor Management Relations Act, does the Act preempt the enforcement of duties arising under state law which are not dependent on interpretation of the CBA?

2. Does the federal duty of fair representation preempt a state negligence action that challenges a union's performance in conducting safety inspections where that duty arises under state law independent of the CBA?

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STATEMENT OF THE CASE

The Coeur d'Alene Mining District, located in Northern Idaho, contains a number of hard rock mines which extend 6,000 feet below the surface and contain up to 125 miles of underground tunnels and workings. (J.A. p. 29). On May 2, 1972, 91 miners lost their lives when a fire broke out in the Sunshine Mine, the largest producer of silver and antimony, located within the Coeur d'Alene Mining District. (Pet.App. p. 108a, 109a).

Prior to the mine fire, the Petitioner Union undertook inspection activities in the Sunshine Mine for the benefit of its members, conducted inspections of the mine, made recommendations to management with regard to safety problems and monitored that such recommendations were acted upon by the mine management. (J.A. pp. 212-216). The Union further undertook to provide information, instruction and guidance and training to its members (J.A. pp. 7-8), and followed up on the implementation of its procedures with the aim of improving member safety. (J.A. pp. 9-12).

As a result of the deaths of their husbands and fathers, the Respondents brought this action seeking damages arising out of the wrongful death of decedent mine workers pursuant to Idaho Code § 5-311.[1] Contrary to the

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[1] §5-311. Action for wrongful death – When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. . . .

position advanced by Petitioner, the basis for the Plaintiffs' claims against the Union is *not* the failure to properly administer and enforce the safety article of the Collective Bargaining Agreement (CBA). (Pet.Br., p. 7). The Respondents' claim is based upon the state law claim for negligence in the *conduct* of safety inspections.

On the initial appeal in *1979* the Idaho Supreme Court recognized that:

> An action for wrongful death is a creature of our state statutes, is of a substantial local interest, and traditionally has been committed to the jurisdiction of the Courts of the state. Moreover, this action for wrongful death is unlikely to present the identical legal issues as a proceeding under the federal labor laws arising from this same factual setting. (Pet.App. p. 155a).

The majority opinion further stated:

> We hold that a material issue remains in existence in the case at bar regarding whether the union had a duty to inspect and the alleged breach of duty.

The Court addressed the claim of preemption and held that the Plaintiffs' claims were not preempted by federal law. (Pet.App. pp. 109a-116a).

The Idaho Supreme Court then remanded to the trial court for further proceedings. The trial court after some additional discovery granted summary judgment for the Union on the negligence claim as well as holding the issue was preempted by federal law.

In February 1986, the Idaho Supreme Court, addressing the state law claim under Restatement (2nd) of Torts, § 323, reversed summary judgment on the negligence

claims which had been entered by the District Court. The Idaho Supreme Court held at that time that the Union:

> . . . did embark upon safety inspections and the issue is whether they negligently performed their undertaking, or whether the Union's negligent performance resulted in the men being subjected to increased hazards or potential for death on the date of the fire and explosion than would otherwise have been the situation had the inspections been performed without negligence. (Pet.App. p. 23a).

The Idaho Supreme Court further held that:

> The miners' cause is not premised on either a claim that the union should perform management safety functions or that the union should make the workplace safe – rather, the cause of action is premised upon the union negligently performing those safety functions which it did in fact undertake. (Pet.App. p. 23a).

The Idaho Court acknowledged that the record before them established that the safety committees were formed and that inspections were made and recommendations were made to the employer concerning mine safety. (Pet.App. 27a, 23a; 77a-87a; *see also* J.A. p. 212; p. 194; p. 179; p. 157, 158; p. 123, 124; p. 104; p. 95-97). The Idaho Court concluded:

> We cannot say as a matter of law that had the inspectors reported these blatant violations to the committee, with the committee in turn reporting them to management, that management would have corrected these defects – but neither was the trial court correct on summary judgment to resolve the factual issue any other way. Rather, such is an issue of proximate cause not properly resolved on summary judgment. The record is devoid of any opposing affidavits or

> deposition testimony that the inspections were, in fact, conducted in a reasonable and prudent manner in accordance with recognized standards. (Pet.App. 29a).

The Court concluded:

> Because the union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection. (Emphasis in Original). *Id.*

The Supreme Court again refused to find that Plaintiffs' claims were preempted by federal law. (Pet.App. pp. 30a-36a).

The Idaho Supreme Court in remanding the negligence claim for trial passed upon the sufficiency of the evidence necessary to withstand summary judgment and concluded that the matter should proceed to trial. The Court acknowledged the CBA and Union Constitution but clearly focused its decision on the facts in the record which supported the claims that the Union had "in fact inspected" the mine and that its duty of due care was to be tested on the basis of that undertaking. (Pet.App. p. 23a).

The Union has not denied nor does it deny in the present brief of Petitioner that it was not involved in safety inspections. The Union in fact concedes:

> A union member of the committee was permitted to accompany the state mine inspector on any state inspection made of the property. The union was also permitted to designate a representative to accompany the company's safety

> engineer once each month on a tour of the section of the mine. . . . The Union appointed three rank and file members . . . to serve on the joint safety committee. . .(Pet.Br. p. 5).
>
> . . . A union representative regularly accompanied the state mine inspector when he came to the mine to make the inspections that were mandated by Idaho law. One of the union representatives also accompanied the company safety engineer each month on a tour of a section of the mine that the safety engineer designated. The safety committee met regularly. . .to discuss what had occurred on these tours and to offer suggestions about safety concerns. (Pet.Br. p. 5).

There are several examples illustrated by the present record which establish that the Union engaged in safety related activities which were reported to management and in fact acted on by management. (J.A. pp. 212-216).

The Union recognized the significant economic and social impact that workplace injuries create, and further demonstrated its commitment to improving the safety of its members through aggressive safety and health programs. (Pet.App. 75a-88a). (J.A. pp. 157-158).

The record demonstrates that the Union undertook to perform inspections and make recommendations seeking to improve the safety for the miners. (J.A. pp. 212-216; pp. 95-97). The Union recognized that an essential part of its undertaking was to confront the company with safety hazards to seek their immediate removal. (J.A. p. 99; pp. 212-216).

While the Petitioner would argue for a factual determination by this Court regarding the adequacy of the inspections, the issues of reliance and reasonable care

have been remanded for trial by the Idaho Supreme Court after review of the adequacy of the record to support such questions of fact. That trial has not been held and the factual issues remain in dispute.

The Petitioner repeatedly attempts to cast the issue as "alleged negligence in administering and enforcing the safety article of the collective bargaining agreement." (Pet.Br. p. 7). Idaho is a notice pleading jurisdiction and the pleading sufficiency has withstood the Idaho Supreme Court's review. The Complaint, in its essential terms, states that the union "undertook to act as accident prevention representative . . . undertook to provide representatives who inspected . . . and did so negligently . . . " The sufficiency of the pleadings incorporating the answers to Interrogatories by Plaintiffs (J.A. p. 8-9) and discovery completed under the Idaho Rules of Civil Procedure, have passed the muster of the Idaho Supreme Court as alleging the requisite "negligent performance" of the undertaking.

There is no doubt that the state of the law in Idaho recognizes a wrongful death claim by the heirs who may proceed against one who undertakes to perform safety inspections and does so negligently. (Pet.App. 23a).

Contrary to the Petitioner's assertions, the Court has consistently addressed the focal issues of the negligence of the Union with regard to the *conduct* which was actually undertaken. (Pet.App. p. 23a).

The Idaho Supreme Court in 1988 on remand from Writ of Certiorari reaffirmed that the instant action did not depend upon an analysis of the bargaining agreement. The Court held:

> [I]n the instant case, no interpretation of the collective-bargaining agreement is required to determine whether the union member of the inspection team committed a tort when he committed various acts and omissions such as failure to note the self-rescuers were stored in boxes with padlocks or that the activating valves of the oxygen breathing apparatuses were corroded shut. Rather, such alleged acts of negligence are measured by state tort law.
>
> We therefore adhere to our opinion as written. (Pet.App. p. 8a).

The Idaho Supreme Court distinguished the instant case from cases where preemption was applied. The Court stated:

> In the instant case we are not concerned with imposing a duty on the union to provide a safe work place. Rather, the issue here is whether the LMRA preempted prosecution of a tort action where the activity was concededly undertaken and the standard of care is imposed by state law without reference to the collective bargaining agreement. (Pet.App. p. 4a).

The Petitioner charges that the Court "changed its focus and held the duty was not founded on the Collective Bargaining Agreement but on what the Union actually was doing." (Pet.Br. p. 11). Such is not the case. In its earlier February 1986 decision, the Idaho Supreme Court had stated that the cause of action was premised on the Union negligently performing those safety functions which it "did in fact" undertake. (Pet.App. p. 23a, p. 29a).

Although the Petitioner seeks to gain advantage from various references by the Idaho Supreme Court to the Collective Bargaining Agreement and to the Union Constitution, a fair reading of the opinions issued by the Idaho Supreme Court as they relate to the basis of the common law duty in Idaho, shows that the Idaho Supreme Court's reliance is and has been on the actual undertaking. In fact, under Idaho law non-feasance of a contract or the failure to perform a contract is not a basis for an action in tort. (*See* discussion re: *Taylor v. Herbold, infra.*, p. 12). The tort action recognized in Idaho arises out of the actual performance of certain conduct and the conduct thereafter becomes the focus of the nature and extent of the duty. (*See, Taylor v. Herbold, infra.*).

This case directly presents the issue of the right of a State to provide for the safety and welfare of its citizens by enforcing state law which, while it may arise contemporaneous with a contract, is not dependent upon interpretation of the contract for the determination of the nature and extent of the duties involved.

Of special concern is the suggestion made by Amicus Public Citizen, that the Respondents in this matter are simply reaching for the "deep pocket" or are otherwise seeking sympathy. (Amicus Public Citizen Brief at pp. 3, 5, 19). Such a contention is outrageous. For Public Citizen to maintain that Respondents' efforts to compel the accountability of the Union and seek to enforce their legal rights should in some way be held in disrepute because they claim money damages is unworthy of such an organization. Respondents are simply seeking to enforce duties owed them based upon the rights afforded by the State of Idaho through the Idaho Wrongful Death Statute.

The law of torts is the law of social accountability based upon sound economic principals that those compelled to pay for the losses they cause will endeavor to correct such behavior so the losses will not occur in the future.

SUMMARY OF ARGUMENT

The LMRA and the duty of fair representation do not address the right of heirs, under Idaho law, to proceed in a wrongful death action against a Union based upon its wrongful conduct. The Idaho Supreme Court is correct in recognizing that the state law rights enjoyed by the heirs are not dependent on the Union contract. Nor is the duty owed by the Union to the *heirs* of a Union member based on contract or the duty of fair representation.

The states, through their tort law, exercise inherent police powers over conduct and activities within the states. The management of such conduct is a significant force upon which states rely such as Idaho, which have a limited statutory body of law, to provide accountability and promote workplace safety. The states are ultimately responsible for the economic impact of welfare, unemployment and injury based compensation systems. These traditional state interests are a compelling basis upon which preemption should be avoided in most instances. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. 724, 85 L.Ed.2d 728, 105 S.Ct. 2380 (1985).

Under the principals set forth in the Court's recent decisions *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Lingle v. Norge Div. of*

Magic Chef, Inc., 108 S.Ct. 1877 (1988), the established rules for federal preemption pursuant to §301 expressly allow these claims of Respondents to proceed under state law. These State law claims do not require interpretation of the terms of the Collective Bargaining Agreement. The claims do not require any reference to the Union contract nor are they inextricably intertwined. The Respondents' claims are based on what was *done not* what was *promised*.

Examination of the judicially developed doctrine of fair representation reveals that said duty does not preempt Respondents' state law claims. Respondents' claims do not involve the type of representational activity contemplated by the fair representation doctrine. Any preemption based upon fair representation would amount to unwarranted immunity for Union activity independent of contract interpretation or the declared intent of Congress.

Respondents' have no standing to pursue claims based upon contract violation under §301 or for claims under the duty of fair representation. Any determination that the federal claims preempt the state cause of action would cast the Respondents into a black hole of the law void of remedy and provide immunity to the Unions for claims by non-member dependents never contemplated by Congress.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT.

Respondents' wrongful death claims against the Petitioner Union are not preempted by §301 of the LMRA. Contrary to Petitioner's contention, Plaintiffs' claims do not depend on a duty found within the CBA. The "source" of the Union's duty is the *conduct* of the undertaking involving safety inspections. Idaho law has long recognized that a contract may create a situation for a tort and that a cause of action "will lie in tort for an act of misfeasance or malfeasance although a contractual relation may exist between the parties." *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho 481, 174 P. 1009 (1918).

Under Idaho law there is a distinction between a failure to carry out a contract for inspection activities and the negligent performance in the conduct of inspections. These distinctions have been characterized as non-feasance versus misfeasance. The Idaho Supreme Court recognized this distinction in its Opinion issued in September of 1986 and in *Carroll v. United Steelworkers*, 107 Idaho 717, 692 P.2d 361 (1984). (Pet.App. 23a-24a). Liability for misfeasance of an undertaking is not new to Idaho law. It has long been recognized in Idaho that a failure to perform a contract would *not* give rise to tort liability, but a tort may arise independent of the contract based on the negligent performance of an undertaking. *Just's Inc., v. Arrington Const. Co.*, 99 Idaho 462, 583 P.2d 997 (1978); *McAlvin v. Gen. Ins. Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976); *Taylor v. Herbold*, 94 Idaho 133,

483 P.2d 664 (1971); *Carroll v. United Steelworkers, supra*. In the *Herbold* case, for example, it was noted.

> A breach of contract is not in and of itself a tort. A contract may, however, create a situation which furnishes the occasion for a tort. When a person renders services to another pursuant to a contract or otherwise, the law imposes a duty of due care in the performance of those services.
>
> "The duty of due care arises . . . irrespective of contract," or "there must be a breach of duty apart from the non-performance of a contract." 94 Idaho at 138.

Under *Taylor v. Herbold*, if the Union had promised to inspect but had never done so, the Respondents would be left without a tort action. The Union's mere non-feasance in complying with the terms of the CBA would not give rise to a tort under Idaho law. Actions for breach of contract in Idaho may well involve an interpretation of what the Union had agreed to do under the Collective Bargaining Agreement. However, the instant action is one based upon misfeasance and cannot be based, in Idaho, on non-feasance. It is not necessary to look to the language of the Collective Bargaining Agreement but requires an examination of the actual *conduct* of the Union.

In fact, the contract provides no real guidance regarding the claims which the Respondents have made here. The Respondents claim, for example, that there was insufficient training in the use of the self-rescuers; there were too few self-rescuers located underground at critical locations; the self-rescuers were kept in locked boxes; the condition of the self-rescuers was such that they were rusted, corroded and unworkable. Some were eighteen (18) years old and had been kept well beyond their useful

shelf life of five (5) years. The contract says nothing about self-rescuers; how to inspect or when to inspect. The negligence was in the inspection which was performed, not in the application of contract terms. (See Pet.App. 28a and J.A. 81-84).

Respondents' claims do not rely on any terms provided under the CBA and do not directly or indirectly depend upon the content or conditions in said agreement.

Particularly, the CBA does not address the legal rights of the heirs. Federal Law has not preempted the Idaho law which provides for the rights of heirs who are not participants in the CBA. Idaho law specifically provides remedy to the *heirs* of one whose death is caused by the wrongful *act* of another. (I.C. § 5-311, fn. 1, p. 2). Idaho law further provides that one who conducts himself negligently in the performance of an *act*, regardless of the reason the action was undertaken, is accountable for the damage caused thereby. (Pet.App. pp. 18a-19a). (Restatement (2nd) of Torts, §§ 323 and 324A).

In *Allis-Chalmers Corp. v. Lueck, supra*, this Court recognized that all claims that a Union member may have are not founded in the Union contract. This Court has repeatedly held that the collective bargaining system exists coincident with numerous state and federal laws which regulate the substantive terms and conditions of employment and protect all employees, whether or not they are represented by a Union or covered by a Union contract.

The *Lueck* Court expressly limited §301 preemption to state law claims which depend on the violation of rights which are protected by the CBA. A state law which

creates rights independent of a collective bargaining Agreement does not undermine either the rights created by contract or the procedures established for resolving disputes which arise under the contract.

In *Lueck*, this Court held that an employee's claim of bad faith handling of a collectively bargained insurance policy was preempted by § 301 since tort application depended on the terms of the agreement. The Court concluded that to do so would evade congressional mandate that federal law must govern the meaning of contract terms. 471 U.S. at 218-219. The Court also reiterated the right of Unions and employers to have contract disputes resolved by a unified body of federal labor-contract law. *Id.* at 219-220. The claim in *Lueck*, however, was clearly dependent on what the contract provided.

This Court was careful to point out in Lueck the narrow parameters of its ruling:

> In extending the preemptive effect of § 301 beyond suits for breach of contract, *it would be inconsistent with Congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.* 471 U.S. at p. 212. (Emphasis added).

In the instant matter, Idaho law proscribes wrongful conduct and grants the right to the heirs to proceed against persons whose wrongful conduct results in death. The Idaho law protects citizens who are otherwise not protected by and do not have standing to complain under federal labor law. Such proscription of conduct (not contract) and establishment of right is clearly independent of the labor contract.

After *I.B.E.W. v. Hechler, supra,* and pursuant to this Court's direction, the Idaho Supreme Court addressed the analysis in *Hechler* and distinguished *Hechler* from the instant case. (Pet.App. pp. 4a-7a). The Respondent in *Hechler* had conceded that the "nature and scope of the duty of care owed [her] is determined by reference to the Collective Bargaining Agreement." 481 U.S. at 851, fn. 5. Footnote 5 of the *Hechler* opinion points out that it was in her brief to this Court that Respondent argued for the first time that her claim "was not dependent on an interpretation of the Collective Bargaining Agreement . . . " *Id.* This Court concluded that "it is too late in the day for Respondent to present to the Court this new found legal theory." *Id.* at 864.

As the Idaho Supreme Court noted:

> Thus, the instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has been pursued consistently both at the trial and appellate levels and the tort exists *without reference to the Collective Bargaining Agreement.*
>
> Accordingly, *Hechler* is inapposite and does not stand for the proposition that a federal LMRA preemption exists in the instant case. (Pet.App. p. 7a) (Emphasis added)

This Court's language in *Hechler* supports the Idaho Court's analysis:

> Respondent's allegations of negligence assumes significance if – and only if – the Union, in fact, had assumed the duty of care that the complaint alleges the union breached. 481 U.S. at 861.

The *Hechler* decision confirms again that the key to preemption under § 301 depends on the need to interpret the Collective Bargaining Agreement. 481 U.S. at 858-859.

There exists no issue in the instant matter of the contractual obligations under the Collective Bargaining Agreement. Whether the Union complied or failed to comply with the terms of the Collective Bargaining Agreement is not the question in a determination of the Respondent's claims. The focus of the Respondent's state based tort action is upon the *actions* or *conduct* and whether the duty, once undertaken, was negligently performed. Respondent's wrongful death claims therefore do not rely upon nor are they "inextricably entertwined with consideration of the terms of the labor contract." *Allis-Chalmers v. Lueck*, 471 U.S. at 213.

A history of § 301 cases was provided by this Court in its decision in *Lingle v. Norge Div. of Magic Chef, Inc., supra.* In discussing the case of *Horton v. Miller Chemical Co.*, 776 F.2d 1351 (CA7 1985) (cert. denied), 475 U.S. 1122, 106 S.Ct. 1641, 980 L.Ed.2d 186 (1986), the Court noted:

> Each of these *purely factual questions* pertains to the *conduct* of the employee and the *conduct* and motivation of the employer. Neither of the elements requires a court to *interpret* any term of a collective bargaining agreement. 108 S.Ct. at 1882. (Emphasis supplied).
>
> Thus, the state law remedy in this case is "independent" of the collective bargaining agreement in the sense of "independent" that matters for § 301 preemption purposes: *Resolution of the state law claim does not require construing the collective bargaining agreement. Id.* (Emphasis supplied).

> [A]s long as the state law claim can be resolved without *interpreting* the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes. *Id.* at 1883. (Emphasis added).

The Court then specifically declared the distinction between federal and state functions respecting § 301 preemption:

> Today's decision should make clear that *interpretation* of collective bargaining agreements remains in the arbitral realm; judges can determine *state law* involving labor management relations only *if such questions do not require construing collective bargaining agreements.*
>
> Second, there is nothing novel about recognizing that substantive rights in the labor relations context can exist without *interpreting* collective bargaining agreements. *Id.* at 1884. (Emphasis added).

Again, the primary distinction that this Court expressed is that preemption depends on whether the CBA must be *interpreted* or *construed*; the Court restates this position at p. 1885 with accompanying footnote:

> In sum, we hold that an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the *interpretation* of a collective bargaining agreement.[12]

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[12] . . . Thus, as a general proposition, *a state law claim may depend* for its resolution *upon both the interpretation of a collective bargaining agreement and* a *separate state law* analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but *the separate*

> *state law analysis would not be thereby preempted.* As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211, 105 S.Ct. at 1911, "not every dispute . . . tangentially involving a provision of the col.. ctive bargaining agreement is preempted by § 301. *Id.* at 1985. (Emphasis added).

The Petitioner contends that it is necessary to interpret the Collective Bargaining Agreement in order to establish Respondent's claims. Petitioner has declared that provisions of the Collective Bargaining Agreement allowed Union designated representatives to "accompany" others on mine inspections and that the Union had authority only to give advice, suggestions and recommendations. (Pet.Br. p. 4-5). The Petitioner then concludes that provisions of the Collective Bargaining Agreement did not create a *contractual duty* to inspect and it therefore follows there can be no assumption of the duty to inspect under state law. The Petitioner continually attempts to cast the Respondents' claim in the image which Petitioner creates. The Petitioner's imagery does not, however, alter the Idaho law.[2]

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[2] Restatement (2nd) of Torts

§ 323. Negligent Performance of Undertaking to Render Services. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking. (Pet.App. p. 23a)

(Continued on following page)

For the purposes of the Respondents' state law claims, it is not important to determine *why* the Union was underground conducting inspections, nor is it important to determine what authority the Union had under the CBA. Under Idaho law, the actual undertaking and conducting of mine inspections, the reporting and reliance are the elements which define and give rise to the duty to carry out such inspections in a non-negligent fashion. Respondents do not assert that the Petitioner breached any contractual duty to inspect. Respondents assert that negligent performance in the conduct of inspecting is the nexus of the duty.

II. COMPELLING STATE INTERESTS MILITATE AGAINST PREEMPTION.

This Court in *Lueck* also restated the need to determine congressional intent before finding preemption and restated that Congress' intent is "the ultimate touchtone."

(Continued from previous page)

§ 324A. Liability to Third Person for Negligent Performance of Undertaking. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking. (Pet.App. p. 58a, fn. 1)

471 U.S. at 208, quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

Given the strong feelings for state's rights within our federal system, there exists a strong presumption against the preemption of state laws. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1982); *See also, Calif. Fed. v. Guerra*, 107 S.Ct. 683, 689 (1987). This Court in *Commonwealth Edison Co. v. Montana* restated its frequent position:

> [p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakingly so ordained. (Citation omitted). 453 U.S. at 634.

Congress' failure to provide any remedy for heirs of the decedents injured by such conduct, as demonstrated in this case, clearly militates for non-preemption.

> It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *see also, Construction Workers v. Laburnum Corp*, 347 U.S. 656, 663-664 (1954)

In contrast, the Idaho Supreme Court clearly expressed Idaho's state interests when it stated:

> We are cited to no authority which indicates that the duty of fair representation encompasses or displaces those duties created by state law which requires a person, corporation or unincorporated association to refrain from engaging in wrongful *conduct* which resulted in death or injury to person or property." (Pet.App. 114a).

The Court continued:

> . . . the interests protected by state wrongful death statutes are unrelated to those governed by federal labor laws . . . we are cited to no authority which would permit the NLRA to take cognizance of wrongful death claims against unions. We are cited to no authority holding that it may be fairly inferred that Congress meant to deprive the states of their powers of determining litigation brought under state wrongful death statutes. (Pet.App. 115a).

The Idaho Supreme Courts conclusion is in keeping with this Court's recognition of the importance of traditional state laws. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 756.

The Petitioner obliquely threatens through what it calls "policy considerations" that imposition of state law duties will cause the withdrawal of safety related representation. (Petitioner's Brief pp. 22-25). The Union's policy argument focuses on its desire not to be held accountable for the services it provides to its members. These arguments are made without consideration of the public policy considerations of the State of Idaho in allocating its resources, preserving the rights of its citizens, providing for the economic impact created by the death of its workers and for promoting safety in the workplace.

The modern workplace is a confluence of several forces and resources wielded by employers, unions and governments. It is the state's right and burden to manage those resources which are related to safety and health to maximize the economic potential for its citizens and minimize demands on the state treasury for unemployment, handicap and injury loss payments.

This issue of accountability under Idaho law can be illustrated by a helpful hypothetical. Suppose an imaginary company, ABC Inspection Services, Inc., approached the Silver Mine and its workers located in North Idaho and offers its services as an inspector of underground mining activities. ABC, Inc., negotiates and enters into a contract for these services. ABC, Inc., actually undertakes to conduct inspection activities in conjunction with mine company representatives or governmental inspectors. This hypothetical company makes reports of its findings to the company with recommendations which are relied upon and acted upon by the company.

Under Idaho law, ABC, Inc., would be liable to the heirs of miners who are killed as a result of negligence in the discharge of its activities in the mine. Such liability is imposed without reference to or interpretation of the contract entered into by ABC, Inc. This situation is analogous to the Union's conduct and the legal issues in the instant matter. The duties apply to all who engage in activities in Idaho which involve protection of persons. The "standard of conduct" is a tool by which the state creates the incentive for compliance with safety related activities. Idaho, which has a limited body of statutory law, relies heavily on its common law doctrines to define minimum standards for health and safety compliance.

Congress has never excluded unionized workers and employers from laws establishing federal mimimum standards and there is no reason to believe that Congress intended state mimimum standards to be applied only to non-unionized work areas. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 755.

The Union proposes that it should not be held accountable under state law for its wrongful conduct in performing inspection duties. It claims that it would be

hampered in its representational abilities and would be unable to provide such services to its members. The Union has suggested that if it is held accountable it might refuse to negotiate for the right to participate in safety inspections. (Petitioner's Brief for Cert. p. 18).

Allowing the State to maintain this state law requirement for accountability will not introduce any objectionable impediment to the Union's equality of bargaining power. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 754-755.

In short, the Union seeks the protection of immunity so it need not compete in the market place of labor representation with other Unions who can and will engage in reasonable safety inspections. Such a contention is contrary to this nation's competitive ideals and historical successes. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 755.

Competition is the lifeblood of our economic system. Competition requires accountability to be effective. Accountability drives the wheels of faithful performance. Holding a Union accountable for conducting reasonable safety inspections operates to improve the services provided to Union members and thereby benefits the state interests.

If, as the Union has suggested, it would not bargain for the right to participate in improvement of employee safety, at least the employer, state and the employee/Union member would be aware of that fact rather than relying on safety inspections for which there is no enforceability or accountability incentive. More importantly, the Union would be faced with the possibility that competition would offer better services in the area of safety. Accountability will serve to improve the overall

product offered by all Unions. Thus, the Petitioner's view of non-accountability is lodged in an illogical and non-productive argument.

The reality is that Union accountability for its wrongful conduct through state law encourages the improvement of the services a Union provides to its members and permits the state to manage its workplace related resources. This occurs, in part, as a result of the interplay of competitive forces and in part due to enforcement of the state's interest in workplace safety by assigning the risk of negligent conduct to the wrongdoer (rather than on already strained state resources).

Accountability of the Union for reasonable inspection activities, where that activity is assumed, will allow the state to allocate its own limited resources for safety inspections to areas where such support is less available. The state's burden to provide for the workplace safety for its citizens and to provide the financial support for work related injuries is a substantial and compelling state interest. States must be permitted to marshall the resources available to them and to exercise control through state laws which seek to compel reasonable performance levels.

Before this Court preempts Idaho from allowing its citizens recourse through the state law and its wrongful death statute, it must first conclude that Congress intended such a result. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 738, 740-741, 751-757.

III. RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE JUDICIALLY CREATED DUTY OF FAIR REPRESENTATION.

The primary emphasis of Petitioner's brief urges that Respondents' claims are preempted by the Union's "sole"

duty, i.e., a duty of fair representation. The Union in reality is urging an unprecedented form of immunity. The Union is attempting to create, for Unions, more protection than is enjoyed by almost any other entity or individual including most governments.

There is no explicit preemption of the state's right to enforce traditional state laws. Absent explicit preemption, courts sustain local regulation unless it conflicts with federal law or frustrates the federal scheme. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 757.

The duty of fair representation was judicially developed in accord with a statutory scheme designed by Congress to promote sound industrial labor relations. Section 9a of the National Labor Relations Act (NLRA) grants a Union (receiving a majority vote of the employees within the bargaining unit) the right to be the exclusive bargaining agent for all employees within that unit. The bargaining monopoly thus created vested the Union with exclusive representation of, and broad jurisdiction over, individual employees.

In order to counter the potential abuse of power that the exclusive bargaining authority granted, the Courts have enforced a concurrent obligation called the duty of fair representation to represent all employees fairly. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967). The duty of fair representation was designed to afford a remedy to employee/union members who were faced with racial discrimination and other such abuses. Thus, the duty of fair representation is a judicially conceived obligation placed upon statutorily created exclusive bargaining representatives to protect

the rights of union members from excesses of majority rule.

Beginning with the watershed case of *Steele v. Louisville & N.R.R., supra,* through *Vaca v. Sipes, supra,* and proceeding to *Breininger v. Sheetmetal Workers Int'l Assn.,* 110 S.Ct. 424 (1989), it has been consistently recognized that the duty of fair representation applies in those instances where there is potential for discriminatory practices on the part of the Union. Never, has this Court stretched the bounds of the fair representation doctrine to the limits suggested by the Petitioner in this matter.

In *Breininger,* this Court faced the question involving discriminatory practices in the administration and management of a hiring hall. Nothing in the *Breininger* decision supports the Petitioner's contention that the duty of fair representation is its "sole" duty. Nothing in *Breininger* supports extending the preemptive effect of the duty of fair representation to *all phases* of a Union's conduct. On the contrary, *Breininger* states quite clearly the limitations of the duty of fair representation doctrine:

> We have long recognized that a labor organization has a statutory duty of fair representation under the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U.S.C 151, et seq., "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." (Citations omitted) 110 S.Ct. at 429.

The duty of fair representation doctrine has focused on Union activity which is arbitrary, discriminatory or conducted in bad faith.

It has been stated at the Circuit Court level that "mere negligence" does not give rise to a claim for breach of the duty of fair representation. *De Arroyo v. Sindicato De Trabajadores AFL-CIO,* 425 F.2d 281, 284 (1st Cir. 1970). The negligence referred to is negligence in the performance of a Union's contract negotiation, arbitration grievance handling, or hiring practices. This concept has never been heretofore extended to Union conduct for tortious acts.

Virtually everything a Union does is arguably done within its representational capacity. To adopt the Union's position would effectively extend immunity to the Union for any and all wrongful conduct unless it can be shown that under the duty of fair representation the Union acted in an arbitrary and discriminatory fashion. Such a conclusion was never within the intention of Congress nor in the contemplation of the Courts which have applied this doctrine.

It is inconceivable that what began as a concommitment duty imposed upon the Union due to its representational monopoly would now be fashioned into a protective shield to disallow legitimate claims based upon the negligent conduct of a Union as an organization.

IV. RESPONDENTS HAVE NO STANDING TO PURSUE ACTIONS FOR COMPENSATION AGAINST THE PETITIONER UNION BASED UPON THE PROVISIONS OF § 301 OR FOR A BREACH OF THE UNION'S DUTY OF FAIR REPRESENTATION.

Considering the length of time this case has been pending and considering the number of times the issue of

preemption has been raised, it is clear that, in spite of the Idaho Supreme Court's inquiry, the question of the Respondent heirs' lack of standing before the NLRB is not disputed by the Petitioner. (Pet.App. 115a). The Respondent heirs have no forum for remedy except through the state action. *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. at 757. Claims of the deceased miners' widows and children as plead under Idaho law are the individual claims of the widows and children resulting from the wrongful deaths of their husbands and fathers. These claims do not include claims the miners may have had, if they had survived. Nor are they based upon any rights or privileges granted to the employee miners under the Collective Bargaining Agreement. *See* e.g. *McLaughlin v. E-Systems, Inc.*, 403 F.Supp. 67 (1975 N.D. Tex.) (Retired employees have no standing to bring suit under the Collective Bargaining Agreement since they were not members of the bargaining unit and Union had not bargained for them.)

An analysis of this issue was provided in *Adkins v. G.M. Corp.*, 556 F.Supp. 452 (1983 S.D. Ohio).[3] The *Adkins*

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[3] This decision was the first in a series of opinions out of the Ohio District Court and 6th Circuit based upon the same original Complaint. The Court in *Adkins I* noted:

> No formal relationship between the spouses and any one of the Defendants is alleged. Without citing authority GMC argues that "[t]here are absolutely no factual allegations that support the conclusion that spouses have rights under [§ 301]. Surely marital

(Continued on following page)

Court (Adkins I), while not precedent for this court, analytically addressed the issue of whether spouses of employees and former employees had standing to sue on the basis of their marital status for damages under the LMRA. The *Adkins* spouse-plaintiffs alleged injury due to the "loss of services, society, and companionship" of their injured mates as a direct result of the mental distress suffered by the employee-spouse.

The *Adkins* Court held that the spousal Plaintiffs had no standing to sue for damages under § 301. They were not parties to the Collective Bargaining Agreement and were not third party beneficiaries since they did not have a personal or beneficial interest in the enforcement of such an agreement. 556 F.Supp. at 456.

The reasoning of *Adkins I* with regard to spousal claims is consistent with the Respondents' wrongful death claims here. Such wrongful death claims are clearly individual and not derived from an interest under the Collective Bargaining Agreement. The *Adkins* Court

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> status does not create a cause of action based on breach of the Collective Bargaining Agreement.
>
> To resolve this question, the Court must decide which parties can bring suit under § 301. The statute is not particularly helpful, since it speaks in the passive voice ("suits . . . may be brought"), and does not identify who can bring suit. However, "courts have generally held [§ 301] creates federal jurisdiction only over parties to the contract being sued upon. (Citation omitted). 556 F.Supp. at 455.

found no preemption of the the spousal-plaintiffs' loss of consortium claims.[4]

A cause of action pursuant to Idaho's wrongful death statute is an individual right of the heirs of the decedent miners. It is independent of any rights granted the miners under the Collective Bargaining Agreement.

The damages recoverable by heirs under Idaho Code § 5-311 are limited. The Idaho Courts have determined that I.C. § 5-311 does not create a right for a survival action, but only a cause of action for the benefit of the heirs. *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944).

The Idaho Court in *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987) stated:

> Since pain and suffering are personal to the deceased and are not damages suffered by the survivors, an action for pain and suffering under I.C. § 5-311 does not survive death. *Id.* at 858, 736 P.2d at 1312.

The heirs in a wrongful death action are limited to recovery for loss of support and services as well as the loss of love, society, companionship and affection. *Sawyer v. Claar*, 115 Idaho 322, 766 P.2d 792 (App. 1988).

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[4] The *Adkins* Court held:

> The Court construes these allegations to be a typical loss of consortium claim under Ohio law. (Citation omitted) Initially, the Court again finds no preemption difficulty, since the tort of causing a loss of consortium is not arguably protected or prohibited by the NLRA. Under Ohio law, the Court finds that the spousal-plaintiffs have stated a viable, if unusual, cause of action. 556 F.Supp. at 458.

Not only are such claims not preempted by federal labor law, there is no other forum where the Plaintiffs in this matter would have standing to bring an action under § 301 or an action based upon the Union's duty of fair representation. To preempt the claims of the heirs under Idaho law would effectively grant immunity to the Union for wrongful death claims which arise in such cases in Idaho.

CONCLUSION

Based upon the foregoing reasons and authority, the Respondents respectfully urge that the decision of the Idaho Supreme Court be affirmed.

Respectfully submitted,

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